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No. 89-1010

In the Supreme Court of the United States

OCTOBER TERM, 1989

LIH Y. YOUNG, PETITIONER

v.

NATIONAL CENTER FOR HEALTH SERVICES RESEARCH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, when an employment discrimination claim under 42 U.S.C. 2000e-16(c) failed to name the proper defendant, the 30-day limitations period for filing the claim should be tolled to permit amendment pursuant to Fed. R. Civ. P. 15(c).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 32a-42a) is unpublished, but the decision is noted at 887 F.2d 235 (Table). The opinion of the district court (Pet. App. 43a-53a) is reported at 704 F. Supp. 88.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1989. The petition for a writ of certiorari was filed on December 27, 1989.[1] The juris-

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[1] We have been informed by the Clerk of this Court that this civil petition was timely filed because the Court building was closed on December 26, 1989. Compare Sup. Ct. R. 30.1 with Sup. Ct. R. 29.1 (1980).

diction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner contends that the district court erred in dismissing her employment discrimination suit against the National Center for Health Services Research (NCHSR), a unit of the Department of Health and Human Services.

1. Petitioner was employed by NCHSR from 1982 to March 19, 1984, as an economist. She alleges that her employer discriminated against her during this period of employment because of her Chinese national origin. Pet. App. 55a-56a. She claims that this led to her being improperly suspended from duty effective March 11, 1984, and that she was ultimately forced to resign on March 19, 1984 (*id.* at 56a).

On April 17, 1984—29 days after she resigned—petitioner contacted an Equal Employment Opportunity counselor to complain that NCHSR had discriminated against her. Petitioner thereafter filed a formal EEO complaint (Pet. App. 96a).[2] Her complaint was rejected by HHS on August 20, 1984 for untimeliness (*id.* at 96a-106a). Petitioner appealed this decision to the Equal Employment Opportunity Commission, which affirmed the HHS ruling in an opinion dated May 3, 1985 (*id.* at 85a-95a). The EEOC determined that petitioner had failed to contact an EEO counselor within 30 days of the challenged discriminatory actions, as she was required to do by 29 C.F.R. 1613.214(a)(1)(i). The EEOC held that a dismissal

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[2] Although the Fourth Circuit's September 9, 1987 opinion states that the formal complaint was filed on April 19, 1984, two days after the meeting with the EEO counselor (Pet. App. 57a), the correct filing date appears to be June 19, 1984. See Pet. App. 33a, 87a, 96a.

was required because the alleged discriminatory actions all occurred between January 23, 1984, and February 27, 1984, but petitioner did not contact an EEO counselor until April 17, 1984, 50 days after the last alleged discriminatory action.

2. Petitioner appealed from this adverse EEOC decision by filing an appeal *pro se* in the District Court of Maryland on June 14, 1985. Pet. App. 34a. She named as defendant:

> National Center for Health Services Research,
> 5600 Fishers Lane
> Park Building, Room 3-50
> Rockville, Maryland 20857
> Attn: John Marshall, Director

Suit was timely filed on a form supplied by the clerk of the district court.[3] Pet. 7. The NCHSR, the Attorney General and the United States Attorney were served on July 18, 1985, 34 days after the filing of the complaint. *Id.* at 34a, 49a. Petitioner's appeal was referred by consent to a federal magistrate, who dismissed the complaint on the ground that petitioner had failed to exhaust her administrative remedies by her delay in contacting an EEO counselor. *Id.* at 67a, 72a-84a.

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[3] The district court correctly observed that petitioner "was required to file her civil action within 30 days after she received notice of the final decision of the [EEOC]." Pet. App. 49a. The record indicates that petitioner received the EEOC decision on May 18, 1985 (C.A. App. 4-5), and her complaint was filed on June 14, 1985. The district court was, therefore, correct in holding that her filing was timely since the thirty-day period expired on June 17, 1985. But see Pet. App. 49a, referring to May 18 as the date when "[t]he EEOC issued plaintiff a right-to-sue letter." Compare Pet. App. 95a (EEOC decision and right to sue notification dated May 3, 1985).

3. Petitioner obtained counsel and appealed. The court of appeals reversed (Pet. App. 54a). "[M]indful of the traditional rule that EEO *pro se* complaints are to be liberally construed" (*id.* at 63a), the court interpreted petitioner's resignation of March 19, 1984 as a "constructive discharge," and, therefore, as a discriminatory act. Since this discriminatory act occurred only 29 days before petitioner's first contact with an EEO counselor, she was held to have complied with 29 U.S.C. 1613.214(a)(1)(i). Her complaint was accordingly remanded to the district court for a determination on the merits. Pet. App. 63a-64a.

4. On remand, the government moved to dismiss because petitioner had not named the "head of the department, agency, or unit, as appropriate" as defendant, a requirement of 42 U.S.C. 2000e-16(c). Petitioner agreed that she should have named the Secretary of HHS, rather than the NCHSR, as the defendant, and asked leave to amend her complaint, substituting the Secretary as the defendant. She further requested that this amendment be allowed to relate back to the original complaint pursuant to Fed. R. Civ. P. 15(c). Pet. App. 34a-36a.

The district court denied petitioner's request, ruling that she could not avail herself of the "relation back" provisions of Rule 15(c) since she had not effected service on any government defendant within the "period provided by law for commencing the action against the party to be brought in by amendment." Rule 15(c).

The court of appeals affirmed. Relying on this Court's opinion in *Schiavone* v. *Fortune*, 477 U.S. 21, 30 (1986), it sustained the district court's decision that Rule 15(c) could not be invoked since there had

been no timely service on the proper defendant. Pet. App. 39a-42a.[4]

ARGUMENT

1. Under Rule 15(c) of the Federal Rules of Civil Procedure, an amendment changing a party against whom a claim is asserted "relates back" to the date the original complaint was filed only if a plaintiff has given adequate notice to the proper defendant within the applicable limitations period. As this Court explained in *Schiavone*, 477 U.S. at 29:

> Relation back is dependent upon four factors, all of which must be satisfied: (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period.

Petitioner, like the petitioners in *Schiavone*, failed to satisfy the second, third and fourth requirements. She filed her civil action on June 14, 1985, on the Friday before the Monday which was the last possible day for filing. Her complaint, however, failed to name the proper statutory defendant, the Secretary of HHS. The first notice received by any of the *named* defendants in the case was 34 days later, July 18, 1985. Pet. App. 49a. Therefore, the Secretary of

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[4] The court of appeals also held that petitioner could not contend on appeal that she had named and served the proper defendant, *i.e.*, John Marshall, director of the NCHSR, since she had conceded in the district court that the Secretary of HHS was the proper defendant. Pet. App. 38a.

HHS neither received notice nor "should have known" about the action by June 17, the last day within the prescribed limitations period.

While Fed. R. Civ. P. 4(j) provides for the service of a complaint on the named defendants within 120 days of its filing, this Court's decision in *Schiavone* makes clear that a plaintiff who seeks to substitute a new party defendant under Rule 15 must nevertheless ensure that the new defendant receives notice within the applicable limitations period. Petitioner was entitled to assume that the U.S. Marshal would complete service on the named defendants within the time provided by Rule 4(j); but because she filed her complaint on the Friday before the limitation period expired, she could scarcely have expected that the named parties would receive actual notice, or the proper parties constructive notice, before the limitations period expired.

2. Petitioner argues that the circumstances of this case warrant an equitable tolling of the limitations period so that Rule 15(c)'s "period provided by law for commencing the action" can be extended to permit an amendment to relate back. Pet. 11. This fact-bound contention does not merit review.[5]

The courts of appeals are divided on the question whether Title VII's 30-day filing period is a statute of limitations that is subject to equitable tolling or is, instead, a jurisdictional requirement that cannot be waived or enlarged on the basis of equitable consid-

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[5] This Court recently denied certiorari in two cases raising very similar issues. *Schoo* v. *United States Postal Service*, 865 F.2d 1259 (4th Cir. 1988) (Table), cert. denied, 109 S.Ct. 3185 (1989), and *Johnson* v. *United States Postal Service*, 861 F.2d 1475 (10th Cir.), cert. denied, 110 S.Ct. 54 (1989). The same result is warranted here.

erations. See *Irwin* v. *Veterans Administration*, cert. granted, No. 89-5867 (Feb. 20, 1990). But petitioner can claim no equities that would support equitable tolling, even in a jurisdiction that permitted it.[6]

Petitioner suggests that this case would have been decided differently in the District of Columbia and Eighth Circuits. She cites as support for this statement *Mondy* v. *Secretary of the Army*, 845 F.2d 1051 (D.C. Cir. 1988), and *Warren* v. *Department of Army*, 867 F.2d 1156 (8th Cir. 1989).

In *Mondy*, a claimant filed his complaint six days before the limitations period expired and moved to proceed in forma pauperis. The district court did not order service of process until the in forma pauperis motion was granted four months later (845 F.2d at 1053 n.2); the court of appeals permitted equitable tolling because it found that delay inordinate. "If the marshal's office had simply followed the path laid out by Rule 4(d) within six days of Mondy's filing, Mondy would have been entitled to relation back under Rule 15(c)." 845 F.2d at 1057. The court expressly distinguished circumstances similar to those here, noting that "the equities may not weigh in favor of a plaintiff who counts on 'same day service' [but] Mondy's behavior did not set up any such photo-finish." *Ibid.*

In *Warren*, the plaintiff also filed his complaint six days before the limitations period expired, and the district court delayed service of process for more than thirty days while an application to proceed in forma

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[6] For that reason, and because petitioner failed to identify the proper party defendant in her complaint and therefore was not entitled to the benefit of the relation back provisions of Rule 15(c), there is no need to hold this case pending the decision in *Irwin*.

pauperis was pending. 867 F.2d at 1158-1160. The court of appeals noted that the Seventh Circuit has held that the pendency of such a motion requires the tolling of the limitations period. *Ibid.*, citing *Paulk* v. *Department of the Air Force*, 830 F.2d 79 (1987). In the present case, the failure of the proper defendants to receive timely service was not due to any unusual delays attributable to the district court; there is accordingly no equitable basis for tolling the limitations period as in *Warren* and *Paulk*.

In any event, petitioner could have preserved her option to amend her complaint by delivering or mailing process "to the United States Attorney, or the United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named." Fed. R. Civ. P. 15(c). That provision is specifically designed to provide persons suing the government with a means to protect themselves against the consequences of naming the wrong federal defendant. See *Cooper* v. *United States Postal Service*, 740 F.2d 714, 717 (9th Cir. 1984), cert. denied, 471 U.S. 1022 (1985); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 407-410 (1967). Thus, if petitioner had mailed or delivered the process to the United States Attorney or any of the other officials listed in Rule 15(c), "within the period provided by law for commencing the action against [the proper defendant]," her amendment of the complaint to name the proper defendant would have related back to the date of filing of the original complaint. She failed to do so, and the U.S. Attorney was therefore not served until July 18, 1985, more

than a month after the expiration of the limitations period.[7]

In short, it is unlikely that either the District of Columbia Circuit, the Eighth Circuit, or any other court of appeals would permit equitable tolling of the requirements of Rule 15(c) in the present case.

3. Petitioner also seeks review of the district court's conclusion that she failed to identify the correct defendant in her complaint, which referred to "National Center for Health Services Research * * * Attn. John Marshall, Director." Pet. App. 34a. As the court of appeals observed, petitioner conceded in the district court that she had named the wrong defendant. *Id.* at 38a.[8] It is clearly established that, where an issue has been conceded in the district court, it cannot be raised for the first time on appeal. *Pye* v. *Mitchell*, 574 F.2d 476, 480 (9th Cir. 1978); *International Traveler Cheque Co.* v. *BankAmerica Corp.*,

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[7] Petitioner has not alleged that HHS or the EEOC engaged in affirmative misconduct, active misrepresentation, or any other activity that would support an argument that the 30-day filing period should be tolled on the equitable grounds listed in this Court's decision in *Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147, 151 (1984) (citations omitted):

> This is not a case in which a claimant has received notice; or where a motion for appointment of counsel is pending and equity would justify tolling the statutory period until the motion is acted upon; or where the court has led the plaintiff to believe that she had done everything required of her * * * [or] where affirmative misconduct on the part of a defendant lulled the plaintiff into inaction.

[8] Petitioner agrees that the concession was made. Pet. 23 n.7.

660 F.2d 215, 224 (7th Cir. 1981). While petitioner argues that such a concession may be voided when "based on an erroneous view of the law" (Pet. 23 n.7), even petitioner admits that whether the concession was in fact based on an erroneous view of the law is "far from clear." *Ibid.*

Petitioner admits that the Sixth Circuit has agreed with the district court's conclusion in *Stephenson* v. *Simon*, 427 F. Supp. 467 (D.D.C. 1976), that the only proper defendant in a Title VII action against a federal employer is "the person highest in the chain of command within a cabinet department, a military department, or an independent agency." Pet. 24-25. See *Hancock* v. *Egger*, 848 F.2d 87 (6th Cir. 1988) (service on Commissioner of Internal Revenue not sufficient under Rule 15(c) to serve as notice of Title VII suit to Secretary of the Treasury). Accord *Honeycutt* v. *Long*, 861 F.2d 1346, 1350-1351 (5th Cir. 1988) (service on head of subdivision of Department of Defense not sufficient under Rule 15(c) to serve as notice of Title VII suit to Secretary of Defense). While several courts have suggested that the statutory language is less than precise,[9] their response has not been to interpret Section 2000e-16(c) to permit the identification of subordinate federal officials as defendants. Instead, in *Williams* (830 F.2d at 31) and *Mondy* (845 F.2d at 1052 n.1), the courts suggested that agency right-to-sue letters should clearly identify for claimants the proper party defendant. The EEOC has accordingly amended its right-to-sue

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[9] *Paulk* v. *Department of the Air Force*, 830 F.2d at 80; *Williams* v. *Army & Air Force Exchange Service*, 830 F.2d 27, 31 (3d Cir. 1987); *Mondy* v. *Secretary of the Army*, 845 F.2d at 1052 n.1.

letter.[10] In light of this revision, any possible uncertainty in the statutory language should no longer lead to confusion about the proper party defendant, and the issue that petitioner attempts to raise despite her concession below is not of any continuing importance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1990

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[10] The statement of appeal rights that the EEOC now provides with its final decisions on claims of discrimination reads:

> *YOU [i.e., the complainant] MUST NAME THE PERSON WHO IS THE OFFICIAL AGENCY HEAD OR DEPARTMENT HEAD AS THE DEFENDANT. Agency or department means the national organization, and not the local office, facility or department in which you might work. DO NOT NAME JUST THE AGENCY OR DEPARTMENT.* You must also state the official title of the agency head or department head. Failure to provide the *NAME OR OFFICIAL TITLE* of the agency head or department head may result in the dismissal of your case.

See, *e.g.*, *Smith* v. *Thomas*, EEOC Appeal No. 01883225 (Feb. 2, 1989), slip op. 7-8.

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